



Judicial Independence and the Lesson of History

BY JUDGE WILLIAM H. PRYOR, JR.

Talk of judicial independence is all the rage. In recent years, leaders of the bench and bar have decried what they describe as unprecedented assaults on the independence of the federal judiciary. The most prominent leader of this chorus has been a distinguished American and public servant, retired Associate Justice Sandra Day O'Connor. At the annual meeting of the American Law Institute in May of last year, Justice O'Connor thanked the Institute for its defense of judicial independence, which she described as under "the most serious attack" in her lifetime.¹ On September 27, 2006, in an op-ed entitled, "The Threat to Judicial Independence," published in *The Wall Street Journal*, Justice O'Connor stated that "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."² The next day, at a conference jointly sponsored by the Georgetown University Law Center and the American Law Institute, Justice O'Connor complained of the "common mantra" about "activist judges" and "a level of unhappiness today that perhaps is greater than in the past and is certainly cause for great concern."³

Other leaders of the bench and bar also recently have complained of attacks on

judicial independence. Michael Greco, president of the American Bar Association two years ago, addressed the House of Delegates of that association, and declared, "Ironically, while American lawyers—and the American Bar Association—are helping to build independent judicial systems in emerging democracies around the world, our own courts are under unprecedented attack. They are being threatened by extremists, who would tear down our courts for political, financial or other gain."⁴ Last year, Michael Traynor, president of The American Law Institute, wrote in a letter to the membership, "Judicial independence is especially important today because the judiciary and the rule of law are under relentless and severe attacks from various quarters."⁵

I respectfully disagree with the conventional wisdom of the bench and bar. I submit that the independence of the federal judiciary today is as secure as ever. The current criticisms of the judiciary are relatively mild and, on balance, a benefit to the judiciary.

I do not mean to suggest that judicial independence is unimportant. It is indispensable to the rule of law. Thomas Paine explained in *Common Sense*, "[I]n absolute governments the king is law,"

but "[i]n America the law is king."⁶ Judicial independence is now and has always been the primary reason that in America the law is king. The phrase "a government of laws and not of men" is derived from a guarantee of the separation of powers,⁷ which includes an independent judiciary to apply the law. It is right and proper for judges and lawyers to speak often in defense of judicial independence, but talk alone is cheap.

I offer a proposal for maintaining judicial independence. A review of the history of the federal judiciary suggests that there is a tested method of defending our independence: that is, to respect the limits of our authority. From the beginning of this great republic, the federal judiciary, during its most challenging periods, wisely has acted with restraint. When we consider how best to maintain judicial independence, now and in the future, we can learn a lot from history.

To that end, I will address two matters. First, I will address the original understanding of American judicial independence. Second, I will address three moments in American history when the independence of the federal judiciary was seriously challenged and the lesson to be learned from those moments.

The Original Understanding of Judicial Independence

Americans recognized the need for judicial independence from the beginning of our nation. Two of the grievances against King George listed in the Declaration of Independence involved the absence of judicial independence in colonial America. The Declaration charged that the king had “obstructed the Administration of Justice, by refusing his Assent to laws for establishing Judiciary Powers,” and had “made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.”⁸

At the Constitutional Convention, the Framers widely agreed that our federal government required a judiciary independent of the other branches, and they provided three guarantees for that independence in the first section of Article III. First, the Framers vested the entire judicial power in the federal judiciary.⁹ Second, they provided that judges would have life tenure or, as the Constitution states, tenure “during good behavior.”¹⁰ Third, they provided that the compensation of judges “shall not be diminished during their continuance in office.”¹¹

The Framers believed in judicial independence but not in the literal sense of the word “independent.” The Framers expected the judiciary to be accountable to the people. Judges would be appointed by the President with the advice and consent of the Senate.¹² Judges would be subject to impeachment.¹³ Judges would be bound by oath or affirmation to support the Constitution.¹⁴

Judicial independence, as originally understood and as understood today, refers to two kinds of independence, one strong and the other weak. The first is decisional independence, that is, the ability of an individual judge to decide each case fairly and impartially based on the facts and law.¹⁵ The second is institutional independence, that is, the ability of the judiciary, as a separate branch, to protect its “institutional integrity.”¹⁶ The structure of the Constitution provides strong protections for the decisional independence of the judiciary but weak protections for its institutional independence. As scholars have described this arrangement, we have both “independent judges” and a “dependent judiciary.”¹⁷

This design was explained during the ratification debates by the most eloquent defender of judicial independence: the original Wall Street lawyer, Alexander Hamilton.¹⁸ In *Federalist No. 78*, Hamilton explicated the tie between strong decisional independence and judicial review.¹⁹ Hamilton described life tenure as the foremost guarantee of decisional independence²⁰ and protection from cuts in pay as a close second.²¹ When the Anti-Federalists argued that the federal judiciary would be too independent, Hamilton responded that the judiciary would be institutionally weak: the “least dangerous” branch because it “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society.”²²

We are all familiar with those words from the *Federalist Papers*, but what about Hamilton’s argument in *No. 81* regarding the ultimate check of judicial abuse? Hamilton argued that

Americans could rest assured that the judiciary would not abuse its power because Congress retained the check of impeachment. He wrote, “There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.”²³ I will return to that subject in a moment.

Historical Challenges to Independence and the Lesson of Restraint

After this auspicious beginning, there have been at least three periods of serious challenges to the independence of the judiciary, two in the 19th century and one in the 20th century. The first came during the advent of the administration of Thomas Jefferson. The second came during Reconstruction. The third came during the New Deal period. Each period of challenge was marked with restraint by the judiciary followed by increased respect for its independence.

A. The Jeffersonian Challenge

When Thomas Jefferson and his political party wrested control of both the presidency and Congress, the losing Federalists, during their lame duck session, passed the Judiciary Act of 1801, which created 16 new circuit judgeships and several justices of the peace.²⁴ In the final weeks of his administration, President Adams nominated and the Senate confirmed Federalists to fill the new offices, and in the final hours Adams signed the commissions for the new officers, the so-called midnight judges.²⁵ “[S]ome of the commissions, including that of William Marbury, were not delivered before Adams’ term expired, and the new President refused to honor those appointments.”²⁶

When the Jeffersonian Republicans came to power, they proceeded to undo the work of the Federalists.²⁷ The Jeffersonians repealed the Judiciary Act, abolished the new circuit judgeships and cancelled the June and December terms of the Supreme Court.²⁸ As every law student learns, William Marbury then sued Jefferson’s Secretary of State, James Madison, by filing a petition for a writ of mandamus in the Supreme Court.²⁹ Most scholars believe the Jefferson administration would not have obeyed an order to deliver Marbury’s commission.³⁰

The Supreme Court responded to this controversy with the most celebrated decision in the history of American law, *Marbury v. Madison*,³¹ and that decision was a model of restraint that would help set the stage for the judiciary to weather a dangerous challenge from the Jeffersonians. Rather than order the delivery of the commission, the Court dismissed Marbury’s petition. Before reaching its decision, the Court explained that it would not review any political judgment of the executive, but limit itself to questions of law.³² The Court ruled that the purported grant of original jurisdiction for the Supreme Court to issue the writ was unconstitutional,

because Article III defined and limited the original jurisdiction of the Court. With Chief Justice Marshall writing, the Court, in what some have described as a “political masterstroke,”³³ defended the doctrine of judicial review, declared an act of Congress unconstitutional and avoided a confrontation with the Jeffersonians. A week later, the Court continued its restraint, when it decided *Stuart v. Laird*³⁴ and refused to declare unconstitutional the repeal of the Judiciary Act of 1801, which abolished the new judgeships.

Following these decisions, a dangerous challenge to the judiciary arose on the front that Hamilton had addressed in *Federalist No. 81*: impeachment. In March 1803, the Jeffersonians impeached “a mentally deranged and frequently intoxicated federal district judge in New Hampshire,”³⁵ John Pickering. As the late Chief Justice Rehnquist stated, “There was no question that Pickering was a disgrace to the judiciary and should have resigned,”³⁶ and a year later, the Senate convicted Pickering on a party line vote.³⁷ That same day, the House voted to impeach an associate justice of the Supreme Court, Samuel Chase.³⁸

The charges against Chase concerned his performance of his judicial duties in charging a grand jury and presiding over two trials.³⁹ The House of Representatives charged Chase with using his position to make political speeches and conducting trials as partisan affairs.⁴⁰ The impeachment trial of Chase occurred a year later,

and the evidence of grave misconduct was weak.⁴¹ Had the senators voted along party lines, Chase would have been convicted, but the Senate failed to convict him. As Chief Justice Rehnquist described the conclusion, “It represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase’s acquittal has governed that day to this: a judge’s *judicial* acts may not serve as a basis for impeachment.”⁴² But there was another conclusion of the Chase affair too: The Jeffersonians “successfully made their point, ‘changing expectations of what constituted proper judicial behavior, thereby excluding overt partisan political activity.’”⁴³

Although I do not propose that the senators at the trial of Justice Chase considered the rulings of the Supreme Court in either *Marbury v. Madison* or *Stuart v. Laird* to be a basis for avoiding an escalation of conflict between the branches, I submit that the earlier restraint of the judiciary avoided a worsening of branch relations that could have led to an ominous result in the later trial of Justice Chase. Consider two questions that by necessity are hypothetical: First, what if the Supreme Court in *Marbury* had ruled that Madison was obliged to deliver the commission? Second, what if the Court in *Stuart* had declared the repeal of the Judiciary Act unconstitutional? We will never know the answers to those questions because the Court acted with restraint.



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B. The Reconstruction Challenge

The second period of challenge came during Reconstruction. As a result of the infamous decision of the Supreme Court in *Dred Scott v. Sandford*,⁴⁴ which had declared the Missouri Compromise unconstitutional, the radical Republicans in Congress after the Civil War looked with disdain on the Supreme Court.⁴⁵ That disdain was understandable; *Dred Scott* was not marked by restraint. The Court had exercised jurisdiction, contrary to its precedent with nearly identical facts in *Strader v. Graham*,⁴⁶ and invoked, for the first time, the notion of substantive due process to declare a federal law unconstitutional.

In 1867, a newspaper editor from Vicksburg, Mississippi, William McCordle, was jailed awaiting trial by a military tribunal on charges of inciting insurrection and impeding Reconstruction.⁴⁷ McCordle filed a petition for a writ of habeas corpus in a federal court, which denied him relief. McCordle then appealed to the Supreme Court.⁴⁸ Some believed that the Supreme Court intended to rule that the Reconstruction Acts were unconstitutional.⁴⁹ After the appeal had been orally argued, Congress overrode a presidential veto and repealed the statute that granted the appellate jurisdiction of the Supreme Court to hear McCordle's request for habeas relief.⁵⁰ The Court delayed its decision pending the legislation and then dismissed the appeal for lack of jurisdiction.⁵¹ The Court based its unanimous decision on the express authority of Congress, in Article III, section 2, of the Constitution to make exceptions to the appellate jurisdiction of the Court.⁵² In contrast with *Dred Scott*, the Court in *McCordle* acted with restraint.

That restraint was rewarded. As Charles Gardner Geyh has written, "The Reconstruction-era Congress had a vested interest in preserving and promoting a strong, stable, and expanded federal judiciary that would enforce the statutes that Congress enacted in the teeth of regional resistance."⁵³ The same year that the Court dismissed McCordle's appeal, Congress enacted legislation that "established nine circuit judgeships, added one justice to the Supreme Court, and reduced the circuit-riding responsibilities of Supreme Court justices to one tour of duty every two years."⁵⁴

Again I do not say that this was an instance of cause and effect. My point is that, had the Court acted without restraint, the consequences could have been severe. Judicial independence almost surely would have suffered.

C. The New Deal Challenge

The final challenge came during the 20th century and specifically the New Deal era. At the beginning of his second term, President Franklin Roosevelt was frustrated with the Supreme Court, which had declared major laws of the New Deal unconstitutional.⁵⁵ "On the disingenuous pretext that many federal judges were old and falling behind in their work, Roosevelt settled on a proposal originally developed in 1913 by then attorney general James McReynolds, who, a quarter of a century later, as an aging Supreme Court justice who often voted against New Deal legislation, would be hoisted on the petard of his own invention," as Charles Geyh has described it.⁵⁶ Roosevelt proposed adding a justice to the Supreme Court for every member over 70 years old, which would bring the total on the Court to 15, and was dubbed the "court-packing" plan.⁵⁷ Rehnquist has written, "The proposal astounded the Democratic leadership in Congress and the nation as a whole."⁵⁸

While the court-packing legislation was pending in Congress, the Court decided two cases, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*⁵⁹ and *West Coast Hotel Co. v. Parrish*,⁶⁰ and, in each case, upheld economic legislation. The former decision upheld the Wagner Act based on a broad understanding of the power of Congress to regulate interstate commerce, and the latter decision upheld a state minimum wage law against a complaint that the law violated freedom of contract. Associate Justice Owen Roberts, who had voted in earlier cases with the *laissez-faire* wing of the Court to declare parts of the New Deal unconstitutional, voted in each case to uphold the law.⁶¹ Following these decisions and the announcement of the retirement of Justice Van Devanter, the court-packing legislation failed.⁶²

Justice Roberts's vote to uphold the economic legislation was called "the switch in time that saved nine."⁶³ What was publicly unknown then but is known now is that Justice Roberts, following the oral arguments in the *Parrish* case in 1936, had already voted with the majority to overrule the precedent on freedom of contract and uphold the state minimum wage law.⁶⁴ That decision of restraint had been made even before President Roosevelt proposed the court-packing legislation in 1937.

D. The Lesson of Restraint

One lesson from these episodes in legal history is that the judiciary has a responsibility to safeguard its own independence by being cautious about the exercise of its jurisdiction and power. The judiciary must not abdicate its duty, but not every controversy requires a judicial resolution or trumping of the will of the majority. The judiciary also has a responsibility occasionally to reconsider the correctness of its own rulings and its relationship with its coequal branches. There will always be times when the law and constitutional duty require the judiciary to issue an unpopular ruling, but the exercise of prudence and restraint, as a matter of course, will enhance the general reputation of the judiciary and enable it to weather those difficult storms.

In each of these episodes, the Supreme Court reached defensive rulings, as a matter of law, but in each episode, the Court had the discretion to decide its cases in a different manner. The Jeffersonians learned, for example, that "the principle of judicial

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review of acts of Congress, as Marshall described it in *Marbury*, was not at odds with the limited government persuasion of the Jeffersonian Republican Party.⁶⁵ The *McCardle* Court did not have to wait a year to allow Congress to repeal its grant of appellate jurisdiction.⁶⁶ While the court-packing legislation was pending, Justice Roberts could have declined to reconsider his adherence to *stare decisis*. But in each instance, the Court resisted the temptation to exercise its power and instead respected the provinces of the political branches.

Conclusion

For those who are concerned today about judicial independence, history suggests that we have an opportunity to do something about it, besides complain. It is not too much for judges to look in the mirror and ask whether some criticisms are fair. As Justice Harlan explained in his famous dissent in *Plessy v. Ferguson*, “[T]he courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives.”⁶⁷ Perhaps, even today, we sometimes fail in that limited and critical duty. Alexander Hamilton explained in *Federalist No. 78* that judges exercise “neither force nor will, but merely judgment.”⁶⁸ Hamilton’s point was that we must depend on the persuasiveness of our written opinions to command the respect of our fellow citizens. In that way, we have the foremost responsibility of safeguarding our independence. ■

Endnotes

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25. Richard H. Fallon, Jr. et al., Hart & Wechsler’s *The Federal Courts and the Federal System* 63 (5th ed. 2003).
26. *Id.*
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William H. Pryor, Jr. is a circuit judge for the United States Court of Appeals for the Eleventh Circuit. This address was delivered for the Law Day breakfast sponsored jointly by the Alabama State Bar and the Alabama Trial Lawyers Association on May 1, 2007. It is an excerpt from the Ola B. Smith Lecture, which was delivered at the University of Virginia School of Law on March 19, 2007, and is being published in the *Virginia Law Review*. *See* William H. Pryor Jr., "Not-So-Serious Threats to Judicial Independence," 93 *VA. L. REV.* ____ (forthcoming Nov. 2007). The lecture expands on themes first published last year in a newspaper op-ed article. *See* William H. Pryor Jr., Op-Ed, "Neither Force Nor Will, But Merely Judgment," *WALL ST. J.*, Oct. 4, 2006, at A14.



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